

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHELE FOTINOS, et al.,

Plaintiffs,

V.

BETH LABSON-FREEMAN, et al..

Defendants.

Case No. 13-cv-04463-TEH

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter is before the Court on Defendants' motion to dismiss, filed on November 26, 2013. On December 19, 2013, the Court allowed Plaintiffs' late-filed opposition to Defendants' motion and ordered Defendants to file a reply on or before January 10, 2014. The Court further vacated the hearing and provided that after the reply deadline the matter would be taken under submission without oral argument, pursuant to Civil Local Rule 7-1(b).

On January 21, 2014, Plaintiffs filed an ex parte application for leave to file a sur-rebuttal to Defendants' reply and attached the proposed sur-rebuttal as an exhibit to their request. Defendants opposed Plaintiffs' request the following day. Plaintiffs request leave to address a case they previously overlooked and to submit newly discovered evidence. Although the Court doubts whether Plaintiffs' submission is proper, it has considered the arguments in Plaintiffs' proposed sur-rebuttal in an abundance of caution and finds that no response by Defendants is necessary. Having carefully considered all of the parties' arguments, the Court now GRANTS Defendants' motion to dismiss for the reasons set forth below.

BACKGROUND

Plaintiffs Michele Fotinos (“Fotinos”) and Patricia Barry (“Barry”) are litigant and attorney, respectively, in several lawsuits in the Superior Court of California, County of

1 San Mateo. In their First Amended Complaint (“FAC”), Plaintiffs allege that three San
2 Mateo Superior Court judges – Defendants Beth Labson-Freeman (“Judge Labson-
3 Freeman”), Jonathan Karesh (“Judge Karesh”), and Robert Foiles¹ (“Judge Foiles”)
4 (collectively, “Defendants”) – violated their rights to free speech, equal protection, and due
5 process by declaring them vexatious litigants under California’s Vexatious Litigant (“VL”)
6 statute, California Civil Procedure Code § 391.

7 California’s VL statute was adopted to ease the burden on the courts caused by
8 meritless litigation. *Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43, 61 (1997). The
9 statute permits a judge to enter an order prohibiting a vexatious litigant from filing any
10 new pro se litigation without permission of the presiding judge of court. Cal. Civ. Proc.
11 Code § 391.7(a).

12 On November 9, 2012, Judge Karesh declared Plaintiffs VLs, based on a motion by
13 opposing counsel in a conservatorship dispute involving Fotinos. FAC ¶ 17; Original
14 Complaint (“Compl.”), Ex. A.² In support of his decision, Judge Karesh cited the fact that
15 Fotinos, acting in propria persona, had filed seven unmeritorious pleadings in five separate
16 matters relating to the conservatorship. Compl., Ex. A. In addition, Judge Karesh said he
17 had heard evidence that Barry had been guiding and facilitating these filings by Fotinos.
18 *Id.* Thus, he ordered that Fotinos be subject to a prefiling requirement in connection with
19 any petition, application, or motion other than a discovery motion, and that Barry be
20 subject to a prefiling requirement in connection with any similar filings made on behalf of
21 Fotinos. *Id.* Judge Labson-Freeman, the presiding judge at the time, signed the VL
22 prefiling order on November 16, 2012. FAC ¶¶ 17, 18; Compl., Ex. B. Judge Foiles

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24 ¹ In their opposition brief to Defendants’ motion to dismiss, Plaintiffs abandoned all
25 claims against Judge Clifford Cretan. Pls.’ Opp’n at 1. The Court therefore dismisses him
26 from this suit. Plaintiffs’ second cause of action, named the “Third Cause of Action” in
27 their complaint, is only against Judge Cretan. As he is no longer a defendant in this suit,
the “Third Cause of Action” is dismissed. Accordingly, only one cause of action, named
the “Second Cause of Action” in Plaintiffs’ complaint, remains.

28 ² Although the FAC refers to exhibits, there were no exhibits attached to the FAC
itself. The Court presumes the exhibits are the same as those attached to Plaintiffs’
original complaint.

1 became the presiding judge in January 2013, and thereafter all prefiling requests were
2 handled by him. FAC ¶ 17.

3 Plaintiffs seek a declaratory judgment that the VL and prefiling orders against them,
4 that were drafted, signed, and enforced by Judges Labson-Freeman, Karesh, and Foiles, are
5 unconstitutional based on the Equal Protection and Due Process Clauses of the Fourteenth
6 Amendment, and that the orders constitute retaliation in violation of Plaintiffs' First
7 Amendment rights to free speech. FAC ¶ 307. Specifically, they argue that only
8 unrepresented litigants may be declared VLs, and Fotinos was not acting in propria person
9 at the time the orders issued, but was actually represented by Barry. Therefore, the orders
10 were issued in violation of the constitution and are void. FAC ¶ 304. Plaintiffs also claim
11 that the orders are void because Judge Labson-Freeman was involved in their drafting even
12 though she had previously been disqualified from the conservatorship case. FAC ¶¶ 43,
13 48.³

14 Defendants move to dismiss for lack of subject matter jurisdiction, arguing that
15 under two separate doctrines of abstention, the Court is precluded from hearing this suit,
16 and that they are immune from suit by operation of the Eleventh Amendment and by the
17 doctrine of absolute judicial immunity. Defendants also argue that Plaintiffs fail to state a
18 claim against them under 42 U.S.C. § 1983.

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20 **LEGAL STANDARD**

21 Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal for
22 lack of subject matter jurisdiction. Defendants here mount a "facial" challenge to
23 Plaintiffs' subject matter jurisdiction, meaning that the allegations contained in the
24 complaint, taken as true, are insufficient on their face to invoke federal jurisdiction. *Safe*

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26 ³ Although Plaintiffs allege in the factual background of their complaint that they are
27 suing President Barack Obama because his nomination of Judge Labson-Freeman to the
28 federal bench breached an "implied fiduciary duty owed to the American people to
nominate judges who are ethical," FAC ¶ 7, he is not named as a defendant in any of the
complaint's actual causes of action.

1 *Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

2 Federal Rule of Civil Procedure 12(b)(6) governs dismissal of a complaint for
3 failure “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In
4 ruling on a motion to dismiss, a court must “accept as true all well-pleaded factual
5 allegations in the complaint” and construe the complaint “in the light most favorable to the
6 plaintiff[.]” *Schlegel v. Wells Fargo Bank NA*, 720 F. 3d 1204, 1207 (9th Cir. 2013)
7 (quotation marks omitted). To survive a motion to dismiss, a plaintiff must plead “enough
8 facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*,
9 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual
10 content that allows the court to draw the reasonable inference that the defendant is liable
11 for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

12

13 DISCUSSION

14 Defendants move to dismiss on the grounds that the Court is barred from ruling on
15 Plaintiffs’ complaint based on the *Rooker-Feldman* doctrine. *See Rooker v. Fid. Trust Co.*,
16 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983). The *Rooker-*
17 *Feldman* doctrine prohibits federal district courts “from exercising subject matter
18 jurisdiction over a suit that is a de facto appeal from a state court judgment.” *Kougasian v.*
19 *TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004). In *Noel v. Hall*, the Ninth Circuit
20 explained that *Rooker-Feldman* bars subject matter jurisdiction in federal district court,
21 “[i]f a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state
22 court, and seeks relief from a state court judgment based on that decision.” 341 F.3d 1148,
23 1164 (9th Cir. 2003). “If, on the other hand, a federal plaintiff asserts as a legal wrong an
24 allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar
25 jurisdiction.” *Id.* (emphasis added).

26 Here, Plaintiffs challenge the VL and prefilling orders issued against them in state
27 court on the grounds that they were unconstitutionally imposed and therefore void. FAC
28 ¶¶ 301-308. Although Plaintiffs’ complaint is replete with references to other unrelated

1 acts of alleged misconduct by Defendants, in their “Second Cause of Action” and “Prayer
2 for Relief,” what they ultimately “seek [is] a declaratory judgment that Defendants . . .
3 violated their rights . . . when they drafted and signed the VL order.” FAC ¶ 307. Thus
4 Plaintiffs’ complaint before the federal court essentially requests a review of the propriety
5 of the state court decision declaring them VLs. This, according to *Rooker-Feldman*, the
6 Court cannot do.

7 Plaintiffs argue that because the conservatorship case would not be impacted by a
8 ruling by the Court, that there is no state court proceeding affected by any action the Court
9 takes in this case, and therefore *Rooker-Feldman* does not apply. Pls.’ Opp’n at 11. That
10 the underlying conservatorship case would not be impacted by the Court’s ruling is of no
11 moment. The VL orders themselves constitute a state court decision. Cf. *Wolfe v.*
12 *Strankman*, 392 F.3d 358, 363 (9th Cir. 2004) (finding that the lack of a VL order in effect
13 meant there was no state court decision that would trigger the application of *Rooker-*
14 *Feldman*); see also *Bashkin v. Hickman*, 411 Fed. Appx. 998 (9th Cir. 2011) (construing
15 plaintiff’s challenge to a California VL order as a request to review a state court decision
16 and affirming dismissal pursuant to *Rooker-Feldman*).⁴

17 Plaintiffs also contend that the VL order is unconstitutional and therefore “void,”
18 and that void orders may be challenged in any court. Pls.’ Opp’n at 165-17. That
19 argument, however, is circular: for the Court to find the order unconstitutional and
20 therefore void, it would need to have subject matter jurisdiction to review the order first.
21 See *Rooker*, 263 U.S. at 415-16 (“If the [state court] decision was wrong, that did not make

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23 ⁴ In *Bashkin*, the Ninth Circuit in an unpublished decision upheld a dismissal based
24 on *Rooker-Feldman* on nearly identical facts. There, the plaintiff brought an action in
25 federal district court under 42 U.S.C. § 1983, challenging a state court decision declaring
26 him a vexatious litigant. The district court for the Southern District of California
27 dismissed citing *Rooker-Feldman*. The Ninth Circuit affirmed, stating: “The district court
28 properly concluded that the *Rooker-Feldman* doctrine barred Bashkin’s action to the extent
that he challenged the vexatious litigant order and any other state court orders and
judgments, because the action is a ‘forbidden de facto appeal’ of state court judgments, and
raises constitutional claims that are ‘inextricably intertwined’ with those prior state court
judgments.” 411 F. App’x at 999 (quoting *Noel*, 341 F.3d at 1158). The Court, while not
bound by *Bashkin*, finds its reasoning persuasive.

1 the judgment void, but merely left it open to reversal or modification in an appropriate and
2 timely appellate proceeding . . . Under the legislation of Congress, no court of the United
3 States other than [the Supreme C]ourt could entertain a proceeding to reverse or modify
4 the judgment for errors of that character.”). Applying the *Rooker-Feldman* doctrine to
5 Plaintiffs’ complaint, the Court finds that “adjudication of the federal claims would
6 undercut [a] state ruling,” therefore, “the federal complaint must be dismissed for lack of
7 subject matter jurisdiction.” *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003).

8 In the alternative, Plaintiffs’ complaint must also be dismissed due to Defendants’
9 judicial immunity. “It is well settled that judges are generally immune from civil liability
10 under section 1983” for acts relating to the judicial process. *Meek v. Cnty. of Riverside*,
11 183 F.3d 962, 965 (9th Cir. 1999) (citing *Mireles v. Waco*, 502 U.S. 9, 9-10 (1991)); cf.
12 *Soliz v. Williams*, 74 Cal. App. 4th 577, 585 (1999) (holding that it is well established in
13 California state courts that “judges are granted immunity from civil suit in the exercise of
14 their judicial functions”).

15 Whether an act is judicial depends on whether the act is a function normally
16 performed by a judge, and whether, in the expectation of the parties, they interacted with
17 the judge in his judicial capacity. *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).
18 Accordingly, two recognized exceptions to the grant of absolute judicial immunity are for
19 “non-judicial actions, i.e., actions not taken in the judge’s judicial capacity,” and for
20 “actions, though judicial in nature, taken in the complete absence of all jurisdiction.”
21 *Mireles*, 502 U.S. at 11-12 (citations omitted).

22 Here Plaintiffs’ sole claim concerns the entry and enforcement of state court orders
23 declaring them vexatious litigants. The issuing of court orders is a core judicial function.
24 Also, the orders were issued when Plaintiffs were interacting with the Defendant judges in
25 their judicial capacity. Although Plaintiffs style their complaint as against the Defendants
26 in their “judicial/individual capacity[ies]” – the act complained of fits squarely within the
27 Defendants’ duties as judges and there is nothing alleged to support a claim against
28 Defendants in their individual capacities. Because Plaintiffs’ sole cause of action relates to

1 acts taken by Defendants in their judicial capacity, Defendants are immune from suit.

2 In sum, due to the limitations imposed by *Rooker-Feldman*, the Court lacks subject
3 matter jurisdiction to review Plaintiffs' claims. In addition, Defendants are immune from
4 suit, as the orders complained of were entered by Defendants in their judicial capacity.
5 Because Plaintiffs' complaint must be dismissed on these grounds, the Court declines to
6 address Defendants' additional arguments for dismissal. Accordingly, Plaintiffs'
7 complaint is dismissed. As no additional facts could possibly cure the deficiencies in
8 Plaintiffs' complaint, the dismissal is with prejudice.

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10 **CONCLUSION**

11 For the reasons set forth above, Defendants' motion to dismiss is GRANTED and
12 the dismissal is with prejudice. The Clerk shall enter judgment and close the case.

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14 **IT IS SO ORDERED.**

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16 Dated: 1/22/14



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18 THELTON E. HENDERSON
19 United States District Judge
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